Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1483

In the Supreme Court of the United States

OCTOBER TERM, 1985

BOLESLAVS MAIKOVSKIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

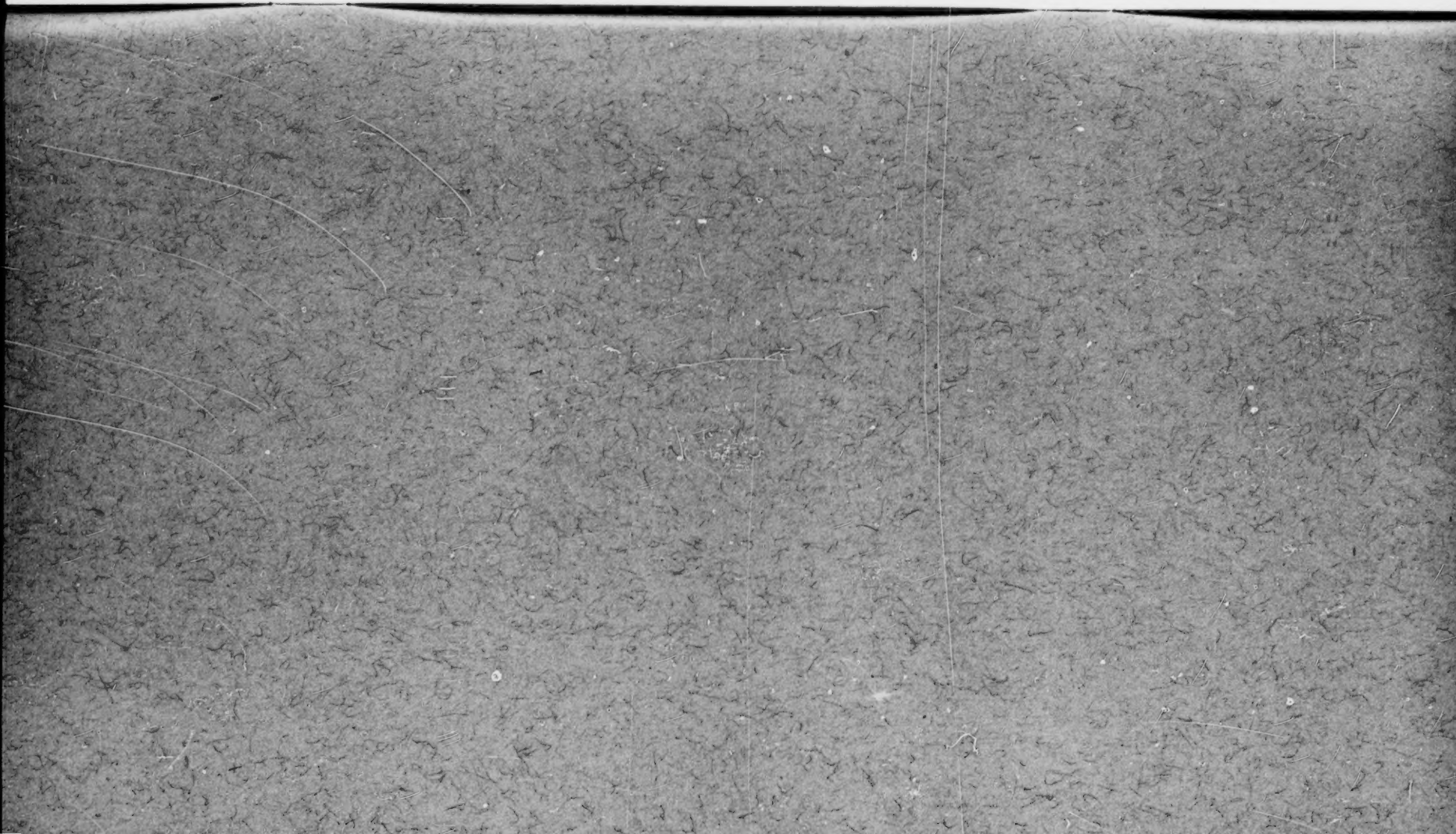
BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217



QUESTIONS PRESENTED

1. Whether misrepresentations made by petitioner when he obtained a visa to enter this country were sufficiently material to justify his deportation.

2. Whether petitioner's participation in the destruction of a Latvian village and the mass arrest of its inhabitants, many of whom were Communists, constituted "persecution * * * because of * * * political opinion" within the meaning of 8 U.S.C. 1251(a)(19).

3. Whether the Board of Immigration Appeals' adoption of a legal theory not urged by the government on appeal denied petitioner due process.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Chaunt v. *United States*, 364 U.S. 350 ..... 4, 5, 6, 7

Dunn v. *United States*, 442 U.S. 100 11

Fedorenko v. *United States*, 449 U.S. 490 ..... 5, 6

Laipenieks v. *INS*, 750 F.2d 1427 ..... 8, 9, 10

United States v. *Sheshtawy*, 714 F.2d 1038 6

Woodby v. *INS*, 385 U.S. 276 5

Statutes:

Act of June 16, 1950, ch. 262, 64 Stat. 219 *et seq.* 2

Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 *et seq.* 2

§ 10, 62 Stat. 1013 6

Page

Statutes—Continued:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* :

§ 241(a)(1), 8 U.S.C. 1251(a)(1) 2, 3, 4, 7

§ 241(a)(19), 8 U.S.C. 1251(a)(19) 2, 3, 4, 7, 8, 9, 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1483

BOLESLAVS MAIKOVSKIS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 773 F.2d 435. The decision of the Board of Immigration Appeals (Pet. App. 37a-89a) is unreported. The decision of the immigration judge (Pet. App. 90a-111a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1985. A petition for rehearing was denied on November 12, 1985 (Pet. App. 36a). On January 16, 1986, Justice Marshall extended the time in which to file a petition for a writ of certiorari to and including March 10, 1986. The petition was filed on March 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government brought this suit to deport petitioner on two distinct grounds: (1) that petitioner was excludable at the time of his entry because he made misrepresentations in connection with obtaining a visa (8 U.S.C. 1251(a)(1)); and (2) that petitioner engaged in acts of persecution because of political opinion while serving as a chief of police in Nazi-occupied Latvia (8 U.S.C. 1251(a)(19)). The immigration judge terminated the deportation proceedings, but the Board of Immigration Appeals reversed and ordered petitioner deported. The court of appeals affirmed.

1. The evidence showed that petitioner lived in Rezekne, Latvia, in July 1941 when Nazi forces invaded that area. The Nazis set up a local police unit under the SS command; petitioner volunteered and was appointed Chief of the Second Police Precinct. In that position, which he held for four years, petitioner ordered his Latvian unit to join German soldiers in taking action against the village of Audrini following the killing of two Latvian police officers in the village. All of the residents of Audrini were arrested, and the village was burned. Petitioner admitted that he participated in this atrocity and that he reported by memorandum the successful completion of the mission. Subsequently, the villagers were all murdered; petitioner denied that he participated in that event. Pet. App. 4a-5a.

Petitioner entered this country in 1951 with an immigrant visa issued pursuant to the Displaced Persons Act of 1948 (DP Act), ch. 647, 62 Stat. 1009 *et seq.*, amended by the Act of June 16, 1950, ch. 262, 64 Stat. 219 *et seq.* In his visa application, petitioner misrepresented the nature of his wartime service. Rather than disclosing that he was a police chief, petitioner stated that from December 1941 to October 1944 he had worked as a bookkeeper for the Latvian Railway Department in Riga, Latvia. Pet. App. 3a. The official

who had issued petitioner's visa under the DP Act testified that if petitioner had told the truth about his wartime activities, his police service would have rendered him ineligible under the DP Act, and she would have denied him a visa (*id.* at 5a).[1]

2. The immigration judge dismissed the deportation proceedings (Pet. App. 90a-112a). He found that petitioner had knowingly and intentionally failed to disclose his police activities in Rezekne during the relevant period, and further, that he had either participated or acquiesced in the arrest of peaceful civilian residents of Audrini, as well as the burning of their dwellings (*id.* at 108a, 112a). The immigration judge found, however, that petitioner's misrepresentation had not been shown to have cut off a line of inquiry that would have led to a determination that he was ineligible for a visa. The immigration judge therefore concluded that the misrepresentation was not sufficiently material to warrant petitioner's deportation under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1) (Pet. App. 108a). The immigration judge also found that the Audrini incident did not justify deportation under Section 241(a)(19) of the Act, 8 U.S.C. 1251(a)(19), because it had not been shown that petitioner was motivated by racism in participating in the arrests and the burning of the village (Pet. App. 108a).

The Board of Immigration Appeals reversed (Pet. App. 37a-89a). The Board found that the arrests and the burning of the homes of all of the inhabitants of Audrini constituted persecution within the meaning of Section 241(a)(19). The Board rejected petitioner's claim that this persecution was

---

[1]Petitioner attempted to rebut that testimony by introducing evidence that some Latvian policemen were admitted to this country. Even petitioner's evidence, however, made clear that anyone known to have served in the Latvian police force would have had his background fully investigated. Pet. App. 5a.

not based upon political motives, finding that "the actions carried out against the Audrini villagers were initiated because of the political opinions held by some of the inhabitants" (Pet. App. 67a). Therefore, the Board stated (*ibid.* (footnote omitted)): "[W]e have no difficulty in concluding that the persecution in which the respondent assisted was based on political opinion and comes within the meaning of section 241(a)(19)." The Board also found that petitioner's misrepresentations on his visa application were material, thereby rendering him deportable under Section 241(a)(1) (Pet. App. 67a-83a). The Board ordered petitioner deported to Switzerland (*id.* at 89a).

3. The court of appeals affirmed, upholding the Board's determination on both counts (Pet. App. 1a-35a). The court held that the materiality test announced by this Court in *Chaunt* v. *United States*, 364 U.S. 350 (1960), was applicable at the visa stage; it stated that under that test "the materiality of the misrepresentation is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa" (Pet. App. 13a). The court held that petitioner's misrepresentations in this case concerning his wartime activities "plainly" met this test (*ibid.*).

Because a finding of deportability under Section 241(a)(19) makes an alien ineligible to apply for discretionary relief, the court of appeals proceeded to consider petitioner's claim that his participation in the Audrini incident did not warrant deportation under that Section (see Pet. App. 14a). The court rejected the claim, holding that the destruction of Audrini was motivated in substantial part by the alleged Communist sympathies of its inhabitants and hence that petitioner had participated in persecution committed "because of * * * political opinion" (*id.* at 20a). The Board's findings, the court held, were based upon "reasonable, substantial and probative support" in the record

(*id.* at 25a). Judge Newman dissented from the court's affirmance on the Section 241(a)(19) count, urging that the case be remanded to the Board to consider whether the Audrini incident should be classed as persecution "because of * * * political opinion" in light of the fact that part of the motivation for the incident appeared to be a reprisal for the deaths of the two Latvian policemen (*id.* at 27a-35a).

ARGUMENT

1. Petitioner contends (Pet. 4-8) that the Court should grant certiorari to consider whether the court of appeals applied the wrong materiality test in determining whether his misrepresentation in obtaining his visa justifies his deportation. This contention is wholly without merit.

Petitioner first notes (Pet. 4-7) that this Court has not resolved the question of the precise materiality test to be applied to misrepresentations in visa applications. Be that as it may, this case presents no occasion for consideration of that issue. The court of appeals here, like other courts of appeals (see Pet. 6), decided to adopt the materiality test set forth in *Chaunt* v. *United States, supra*. That test applies in denaturalization proceedings, where the issue is the materiality of misrepresentations made in order to secure citizenship. Because it is well established that the government bears a "heavy burden" (*Fedorenko* v. *United States*, 449 U.S. 490, 505 (1981)) in seeking to divest a naturalized citizen of his citizenship, this materiality standard is a stringent one. The present case involves only the deportation of an alien, not the more serious step of the denaturalization of a citizen, which was at issue in *Chaunt*. If the materiality standard applicable to visa applications in deportation actions is to be a different one, it should be a lesser standard than in *Chaunt*, not a greater one.[2]

---

[2]The burden of proof in deportation actions is the same as that in denaturalization actions: "clear * * * and convincing evidence." *Woodby* v. *INS*, 385 U.S. 276, 286 (1966).

Petitioner offers no basis whatsoever for suggesting that a stricter standard of materiality should apply here. There is therefore no way that petitioner could benefit from a ruling that the court of appeals erred in applying the *Chaunt* standard to misrepresentations made in the visa application process.[3]

Petitioner also briefly suggests (Pet. 7-8) that the Court should grant certiorari to resolve an alleged conflict in the courts of appeals regarding the correct interpretation of *Chaunt*. Whatever may be the merit of the assertion that there is a conflict, it is clear that this case presents no opportunity to address the question because the facts of this case compel a finding of materiality even under the most stringent view of the *Chaunt* test relied upon by petitioner. Both Justice Blackmun in his concurring opinion in *Fedorenko*, 449 U.S. at 523-526, and the Tenth Circuit in *United States* v. *Sheshtawy*, 714 F.2d 1038, 1040-1041 (1983), acknowledged that the *Chaunt* test is satisfied if the government demonstrates the "existence of disqualifying facts" (449 U.S. at 524; 714 F.2d at 1040) that were covered up by the misrepresentations in question. That standard is plainly satisfied here. Petitioner has admitted his involvement in the Audrini incident, and he does not and cannot dispute that his assistance to the Nazis in that act of persecution made him ineligible for entry into this country under the DP Act. See Pet. App. 13a, 43a, 81a.[4] Indeed, even

---

[3]In fact, the statutory provision under which petitioner's misrepresentations rendered him excludable—and hence deportable—contain no explicit materiality requirement at all. Section 10 of the DP Act made excludable any person who "willfully ma[d]e a misrepresentation for the purpose of gaining admission into the United States." 62 Stat. 1013.

[4]Persons who "assisted the enemy in persecuting civil populations," regardless of motivation, were not eligible for admission under the DP Act because they were not refugees of concern to the International Refugee Organization. See Pet. App. 42a-43a.

petitioner's own formulation of the test—that the government must prove that "had the undisclosed facts been known, an investigation would have been conducted and disqualifying facts would have been discovered" (Pet. 8)—is satisfied here. Petitioner's own witnesses testified that even if petitioner's status as a Latvian police chief was not alone enough to disqualify him, it would have induced the authorities to have "his background fully investigated" (Pet. App. 5a). Thus, under any view of *Chaunt*, it is apparent that petitioner's misrepresentations concerning his wartime service, which covered up his disqualifying role in the Audrini incident, were material and therefore warrant his deportation under 8 U.S.C. 1251(a)(1).

2. Petitioner contends (Pet. 9-15) that the court of appeals erred in finding him deportable under Section 241(a)(19) because he lacked any personal motivation to persecute on the basis of political opinion when he participated in the Audrini incident. Petitioner's construction of Section 241(a)(19) is incorrect, and his assertion that the court of appeals' opinion on this point conflicts with decisions of other circuits is totally without foundation.

a. Petitioner asserts (Pet. 12) that his motivation for ordering the mass arrest of the inhabitants of Audrini and the total destruction of the village was "not only different from that of the Nazis, but was also completely legitimate." While petitioner does not dwell on the "legitimate" motivation for the Audrini atrocity, he contends that his conduct was not based on the political opinions of the villagers. Petitioner does not dispute that the court of appeals was correct in finding that the destruction of Audrini constituted political persecution by the Nazis. He argues instead that this political motivation cannot be ascribed to him, and that he is therefore not deportable under Section 241(a)(19).

As the court of appeals explained (Pet. App. 20a), the plain language of the statute refutes petitioner's contention.

Section 241(a)(19) covers persons who assisted, ordered, or participated in "the persecution of any person because of * * * political opinion." The statute asks whether the event in question was an act of persecution within the meaning of the statute and then whether the alien participated in that act of persecution. The statute plainly does not contemplate an inquiry into the individual alien's motive for assisting in persecution. This interpretation is further supported by the legislative history cited by the court of appeals, which emphasizes that the statute is directed at persons who assisted in governmental acts of persecution, not persons who took it upon themselves as individuals to commit acts of persecution (see Pet. App. 21a). Thus, petitioner's major role in the Audrini incident—an act of persecution directed by the Nazis at Communists because of their political beliefs—makes him deportable under Section 241(a)(19) regardless of whether he personally harbored any animus against Communists.[5]

Petitioner errs in asserting (Pet. 10) that the court's failure to examine his individual motives for participating in the Audrini incident placed it into conflict with *Laipenieks* v. *INS*, 750 F.2d 1427, 1435 (9th Cir. 1985). In *Laipenieks*, the court of appeals found that the alien was not deportable because there was insufficient evidence that he had participated or assisted in acts of persecution; that is, the court found that the evidence did not support the conclusion that "any individual apprehended by Laipenieks was eventually

---

[5]Petitioner mischaracterizes the court of appeals' opinion when he asserts (Pet. 10-11) that the court has held that anyone who assisted the Nazis in any endeavor is subject to deportation under Section 241(a)(19) because the Nazis engaged in acts of persecution. The court held only that the Section applies to persons who assisted in a particular act of persecution that meets the statutory criteria; an alien who assisted the Nazis in some regard but did not participate or assist in the types of persecution specified in the statute would not be covered.

persecuted because of the person's political beliefs" (*id.* at 1437). The *Laipenieks* court therefore held that an alien could be deported under Section 241(a)(19) only if it was shown that the alien's acts "led to the persecution of individuals because of political belief" (750 F.2d at 1435). The Ninth Circuit never suggested that an alien who participated in acts of persecution ordered by the Nazis because of race, religion, or political opinion would be immune from deportation as long as the individual had a different motive for participating in the particular acts of persecution. Thus, the decision below is fully in accord with *Laipenieks*.

b. Petitioner contends (Pet. 15-16) that the court of appeals erred in finding that his conduct would be covered by Section 241(a)(19), even if the Audrini incident was motivated in part by the killing of the two Latvian policemen. The court of appeals concluded that Section 241(a)(19) was applicable as long as political opinion was the "principal motivating factor" for the incident (Pet. App. 26a). Petitioner provides no basis for the implicit contention that Section 241(a)(19) is inapplicable where there was a second motive for an act of persecution, no matter how dominant the primary motive of persecuting persons because of their race, religion, or political opinion. Once again, there is no reason to suppose that Congress would have intended that Section 241(a)(19) be given such a restrictive construction.[6]

Petitioner asserts that the decision below conflicts with *Laipenieks* because at one point in its opinion the Ninth Circuit stated that the government must prove that "individuals were persecuted solely because of their political opinion" (750 F.2d at 1437). This isolated statement plainly

---

[6]Even the dissenting judge in the court of appeals explicitly rejected that construction of the statute; he stated that he "agree[d] with the majority that political opinion need be only a 'major motivation' for the persecution" (Pet. App. 31a).

does not reflect a holding by the Ninth Circuit that Section 241(a)(19) cannot apply where there is any additional motivation for a particular act of persecution. The Ninth Circuit was not faced with that situation. The court in *Laipenieks* found that there was "no evidence" that any of Laipenieks' victims had been persecuted because of his political opinion (750 F.2d at 1437); thus, the court found that political oppression was not a motive at all, much less a dominant one, for the persecution in question. In short, there is no basis whatsoever for supposing that the Ninth Circuit would not agree with both the majority and the dissent here that Section 241(a)(19) applies where political oppression or religious hatred is the dominant, albeit not exclusive, motive for an act of persecution.

3. Petitioner also contends (Pet. 16-20) that basing his deportation in part on the Audrini incident violates his due process rights because the government had disclaimed reliance on that incident subsequent to the close of the hearing before the immigration judge and did not rely on it in its brief before the Board. This factbound contention is without merit and does not warrant review by this Court.

As the court of appeals explained in detail (Pet. App. 14a-17a), the immigration judge made a request of the government, more than a year after the close of the evidentiary hearing, in which he asked it to clarify which factual allegations it was relying on to support deportation under Section 241(a)(19),which had been identified in the order to show cause as a separate charge of deportability. The government's response did not list the Audrini incident, although both parties in their post-hearing briefs had addressed the relevance of that incident to the Section 241(a)(19) charge. In its brief before the Board of Immigration Appeals, the government also did not rely on the Audrini incident. Nonetheless, the court of appeals correctly concluded (Pet. App. 17a-19a) that it did not violate

due process under the circumstances of this case for the Board to base petitioner's deportation in part on that incident.

Petitioner cites no authority to support his position that an appellate tribunal is constitutionally prohibited from relying on a ground advanced at trial but not pressed on appeal. As the dissenting judge acknowledged (Pet. App. 34a), petitioner from the outset had notice that the Audrini episode would be relied upon to support the Section 241(a)(19) charge. He was therefore aware that he should place in the record whatever evidence he had that was germane to that charge. Thus, petitioner was not prejudiced in any way in the factual presentation of his case by the government's post-trial statement. For that reason, this case is clearly distinguishable from the cases relied upon by petitioner (Pet. 19), in which the defendant was deprived of the opportunity either to prepare for trial or to present his case to the finder of fact. See, *e.g.*, *Dunn* v. *United States*, 442 U.S. 100, 106-107 (1979).

Nor was petitioner prejudiced in the appellate presentation of his case. While it may be true that petitioner would otherwise have addressed the Audrini incident directly in his brief before the Board, he did address it in his brief before the immigration judge. Thus, his position on this issue was fully aired when the Board took it under consideration. The Board considered the evidence and correctly concluded that the Audrini incident made petitioner deportable under Section 241(a)(19). That conclusion was concurred in by the court of appeals, which is the ultimate arbiter of this legal issue, and there is no dispute that petitioner had every opportunity to present his contention on this issue before that court. In sum, petitioner was in no way prejudiced by the government's failure to link the Audrini incident to the Section 241(a)(19) charge at the conference before the immigration judge held one year after the close of the evidence at the deportation hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

MAY 1986

DOJ-1986-05